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IN THE

Supreme Court of the United States

No. 543, October Term, 1957

KECO INDUSTRIES, INC. and KNAPP BROTHERS MANUFACTURING COMPANY,

Appellants,

v.

THE CINCINNATI & SUBURBAN BELL TELEPHONE COMPANY,

Appellee.

MOTION TO DISMISS

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v.

THE CINCINNATI & SUBURBAN BELL TELEPHONE COMPANY,

Appellee.

MOTION TO DISMISS

Appellee in the above entitled case, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal on the grounds that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on, and that the appeal does not present a substantial federal question.

ARGUMENT

I. The Question Was Not Timely Raised

In order to invoke the jurisdiction of the Supreme Court of the United States, as Appellants have attempted to do, under Title 28, United States Code, Section 1257(2) (Appellants' Jurisdictional Statement, Appendix F, page 37a), state procedures must have been followed in raising the federal question. Thus, when required by state practice,

the federal question must be raised before the trial court and at the point considered appropriate under state procedure. If this is not done, the Supreme Court of the United States has declined to exercise jurisdiction both where the highest state court expressly refuses to decide the federal question for this procedural reason and where the highest state court is completely silent on the federal question. *Pennsylvania Railroad Company* v. *Illinois Brick Company*, 297 U. S. 447, 462-3, 80 L. Ed. 796, 803-4 (1936); *Erie Railroad Company* v. *Purdy*, 185 U. S. 148, 46 L. Ed. 847 (1902); *Mutual Life Insurance Company* v. *McGrew*, 188 U. S. 291, 309, 47 L. Ed. 480, 485 (1903). In the latter instance, the Supreme Court of the United States has assumed, unless it can affirmatively be shown otherwise, that the silence is due to the procedural deficiency. *Bailey* v. *Anderson*, 326 U. S. 203, 206-7, 90 L. Ed. 3, 6 (1945).

For their federal question Appellants contend that by the decision of the state court they are deprived of any remedy and that this constitutes a deprivation of property without due process of law. However, under the Ohio authorities, this question was not properly and timely raised by Appellants in the trial court, the Court of Common Pleas of Hamilton County, Ohio, or determined by that court, and consequently may not be raised for the first time in a reviewing court.

As was stated in *State ex rel. McKay* v. *Board of Elections of Montgomery County*, 65 Ohio Abstract 547, 550, 115 N. E. (2d) 858 (1953):

> "It is well established that a constitutional question may not be raised for the first time in a reviewing court. *To be reviewed the question must have been raised and determined by the trial court.*" (Emphasis supplied.)

The opinion cites numerous authorities for this proposition, including the decision of the Ohio Court of Appeals for

the First Appellate District, which includes Hamilton County, Ohio, in the case of *City of Cincinnati* v. *Lindsay*, 88 Ohio App. 117, 97 N. E. (2d) 693 (1950), where the same result was announced in a per curiam opinion.

The reason underlying this rule is well stated in 3 Ohio Jurisprudence (2d) 40-1 (Appellate Review, Section 185):

> "The forum of a reviewing court is not a place where for the first time a point which has not been deemed of essence at the trial and which has not been seriously pressed to the attention of the court is to be brought to the front for the mere technical purpose of securing a reversal of a judgment which the court finds otherwise correct. The law does not permit the party to lie by, without stating the ground of his objection, take the chances of success on the grounds on which the judge has placed the cause, and then, if he fails, avail himself of an objection which, if it had been stated, might have been removed.
>
> "*This general rule applies where the constitutionality of a statute is involved.*" (Emphasis supplied.)

Appellants seek to overcome the effect of this rule by arguing that the issue was properly raised in the trial court, on the ground that it did not arise until the trial court had sustained the demurrer to the second amended petition and that they were not bound to anticipate the construction that was placed on the statute by the trial court. This argument, however, is untenable. When the case was before the trial court on Appellee's demurrer to the second amended petition, one of the issues presented was whether or not the right of restitution upon which Appellants relied, if it had ever existed at common law, had been abrogated by the enactment of the Ohio public utilities law. Appellants contended in the trial court that the right existed at common law and had not been abrogated by statute. Appellee contended in the trial court,

as it still contends, that no such right existed at common law, but that if it did, it had been superseded by the adoption of a comprehensive statutory scheme of rate regulation that was entirely inconsistent with the asserted right of restitution. With these arguments before it, the trial court held for Appellee and sustained the demurrer. It was not until that stage of the proceedings that Appellants for the first time, in their third amended petition, sought to raise this constitutional question. As the trial court correctly pointed out (Appellants' Jurisdictional Statement, Appendix D, page 20a), the language by which Appellants sought to raise this constitutional question was "merely an attempt to argue that if the Court correctly interpreted the applicable statutes when it sustained the demurrer to the previous pleading, then such statutes must necessarily be unconstitutional."

Obviously, this was merely a variation of the argument that Appellants had already advanced to the court. If Appellants had wished to raise this constitutional question, they should have done so when the occasion first presented itself, that is, when the trial court had before it Appellee's demurrer to the second amended petition. What Appellants in reality sought to do by filing their third amended petition was to obtain a rehearing on a question already determined by the trial court, to enable them to raise a constitutional argument that they had previously failed to make. However, the procedure in the Courts of Common Pleas of Ohio does not provide for an application for rehearing, and even if it did, such an application would not be the proper place to raise for the first time a constitutional question which could have been raised at the original hearing.

Appellants in their Jurisdictional Statement (pages 8-9) rely heavily, as they did in the state courts, on the case of *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U. S.

673, 74 L. Ed. 1107 (1930), but this case in no way supports their position. The Court there held that under the circumstances of that case a constitutional question was raised in time for presentation to the Supreme Court of the United States on petition for a writ of certiorari, even though it was raised for the first time in an application for rehearing to the supreme court of the state. This result followed, however, only because, under the special circumstances presented, that was the first time the question could have been raised. The Supreme Court of Missouri in that case had held that a bill in equity was not a proper remedy, because relief could have been obtained in an administrative proceeding, by application to the state tax commission. This, however, overruled a decision of the same court rendered six years before, and followed ever since, to the effect that the state tax commission had no power to grant the relief sought. Furthermore, by the time the state supreme court overruled its earlier decision, the time for the plaintiff in the case before it to apply to the state tax commission had expired. It was under these circumstances that the Supreme Court of the United States held that the constitutional question arising from the state court's overruling of its previous decision was presented in time, even though first raised in an application for rehearing. The Court made it clear that it would not have reached that conclusion if the case had not involved the overruling of a previous decision, upon which the plaintiff had justifiably relied to its irreparable injury. The Court said, 281 U. S. at page 682 (Note 9):

> "Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own."

So, in the present case, Appellants were not entitled to assume that the trial court would decide the question of statutory construction in their favor, and then, when they were disappointed in that regard, to attempt for the first time to argue that the statute as construed by the trial court was unconstitutional. They well knew the construction of the statutes that was being urged by Appellee and, therefore, they had to assume the risk that the court would accept that construction. If it was their contention that the construction resulted in the unconstitutionality of the statute, they were bound to raise that argument when the court had the question of construction before it. This they did not do, but instead kept silent on the constitutional question and took their chances of success on the question of statutory construction.

Under these circumstances, the trial court correctly concluded that Appellants were merely attempting to reargue, on new grounds, a point that the court had already decided. The language which Appellants added to their third amended petition constituted mere argumentation, and therefore it did not remedy the defects which had caused the court to sustain Appellee's demurrer to the second amended petition. Since these defects were not remedied, Appellants were not entitled under Section 2309.60 of the Ohio Revised Code (Appendix) to file their third amended petition, because that statute permits the filing of an amended petition after a demurrer is sustained only if the defect can be remedied by the filing of the amended petition. 31 Ohio Jurisprudence 953 (Pleading, Section 345). Therefore, the trial court properly sustained Appellee's motion to strike the third amended petition from the files.

Thus, it is clear that the constitutional question which Appellants seek to raise in this appeal was not timely raised in the trial court and that the court therefore properly refused to consider it.

Appellants have made no real effort to argue the constitutional question at any point in the state courts until they had already lost the case on the purely nonfederal question of statutory construction. Thus, just as in the trial court Appellants did not raise their constitutional argument until after the demurrer had been sustained, so in the Supreme Court of Ohio they gave the matter only token treatment until after the decision of the Supreme Court when they filed an application for rehearing. For example, it is noteworthy that until the filing of their application for rehearing in the Supreme Court of Ohio, they cited no authority on the constitutional point except the single case of *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107 (1930), which, as previously pointed out (*supra*, pages 4-5), does not support their argument in this case. Also, mention should be made of the fact that the application for rehearing, which was overruled, dealt exclusively with the constitutional issue.

Moreover, it is to be noted that the Supreme Court of Ohio made no reference whatever to the constitutional question in its opinion. Appellants' Jurisdictional Statement, Appendix A, pages 1a-8a. If that court had felt the question to be properly before it, it seems logical that the court would have made some reference to the point, even if only to say that it was without merit. Also, the Ohio Court of Appeals, even when it reversed the decision of the trial court, found Appellants' third assignment of error, which was the one attempting to raise the constitutional question, to be not well taken. Appellants' Jurisdictional Statement, Appendix B, page 9a. Of course, in view of the fact that the Court of Appeals wrote no opinion, it cannot be definitely determined whether this was a decision that the question was not properly presented, or whether it was a decision that the argument had no merit,

since Appellee had taken both positions in its brief; under the circumstances, for the purpose of determining whether this appeal presents a properly raised federal question, it will be assumed that the decision of the state court was based on the procedural deficiency. *Bailey* v. *Anderson*, 326 U. S. 203, 206-7, 90 L. Ed. 3, 6 (1945).

Furthermore, this assumption corresponds to the facts of the case. The trial court decided the matter on a motion to strike the third amended petition from the files, and stated in its opinion that Appellants were merely attempting to reargue, on a constitutional ground, the question it had already decided as a matter of statutory construction. Since the Supreme Court of Ohio affirmed the judgment of the trial court, it necessarily approved the granting of the motion to strike the third amended petition, which would indicate that it agreed with the trial court that the constitutional question, even if it had merit, was raised too late.

II. The Question Is Not Substantial

Full and proper treatment of this phase of the case, which of course goes to its merits, would entail lengthy and exhaustive briefing similar to that undertaken in the state courts. Since that, however, appears beyond the limits permitted or desirable on a motion to dismiss, it is believed that the highlights of Appellee's arguments on this issue can be established, first, by pointing out certain inaccuracies in Appellants' statements of the questions and facts presented and, secondly, by pointing out certain distinguishing features in the key legal authorities cited by them.

(A) Appellants' Facts

Since the case was decided on the pleadings, there should be no room for dispute as to the facts. However,

the portion of Appellants' Jurisdictional Statement which purports to set forth the questions presented and the statement of the case contains numerous statements that are not set forth in the pleadings and that are not accurate. While some of Appellants' inaccuracies are of no great significance, others serve to create a false impression of the factual situation out of which the legal questions presented in this case arise. In the interest of brevity, only the major inaccuracies will be pointed out.

On pages 2 and 3 of their Jurisdictional Statement under the heading "Questions Presented," Appellants make five references to "excessive rates." However, there has never been a finding by either the Public Utilities Commission of Ohio or the Supreme Court of Ohio that the rates which Appellee charged during the period from June 1, 1953 through June 4, 1954 were excessive. A reading of the Supreme Court's opinion in the appeal from the order of the commission (Appellants' Jurisdictional Statement, Appendix E, pages 22a-36a), discloses that the court at no point even intimated that the rates collected by Appellee were excessive. Nor should this occasion any surprise, since the Supreme Court of Ohio, in appeals from the Public Utilities Commission, passes upon the question of whether the commission orders are unlawful or unreasonable, not on the question of whether the rates approved in its orders are unlawful or unreasonable. It is axiomatic that the fixing of rates is a legislative, not a judicial, function.

The mere fact that the Supreme Court of Ohio has in a given case reversed the commission's order as unreasonable is in no sense a finding that the rates that were established in that order are unreasonable or excessive. Both the truth of this statement and the significance of this distinction between the order and the rates are clearly demonstrated by the decisions of the Supreme Court of Ohio in three

successive appeals from the orders of the commission in the 1948 rate case of The Ohio Bell Telephone Company. *City of Columbus* v. *Public Utilities Commission,* 154 Ohio St. 107, 94 N. E. (2d) 693 (1950); *Ohio Bell Telephone Company* v. *Public Utilities Commission,* 155 Ohio St. 526, 99 N. E. (2d) 653 (1951); *City of Columbus* v. *Public Utilities Commission,* 158 Ohio St. 101, 106 N. E. (2d) 775 (1952). In the first appeal, the commission's order approving a rate increase was held unlawful because based on an erroneous construction of the Ohio statutes governing the determination of the rate base. In the final appeal, a subsequent order, approving the same rates that had been approved in the first order, was affirmed. In other words, although the first order was unlawful, the rates approved therein were not.

Also, in connection with the propriety of the rates that were charged during the June 1, 1953-June 4, 1954 period, it must be noted that both the Supreme Court of Ohio in this case and the Supreme Court of Illinois in *Mandel Bros.* v. *Chicago Tunnel Terminal Company,* 2 Ill. (2d) 205, 117 N. E. (2d) 774 (1954), have held that where the rates have been "established by the proper designated authority after a hearing and consideration in full compliance with the law, . . . until such time as they were set aside by the Supreme Court, they were, in the absence of a stay, the lawful rates and the *only* ones which could be collected by the utility." Appellants' Jurisdictional Statement, Appendix A, page 6a.

A related inaccuracy appears on page 4 of Appellants' Jurisdictional Statement where they state that "as alleged in the third amended petition, such reduced rates were the 'maximum rates and charges the defendant (Cincinnati Bell) should have been authorized to collect' *as determined by the court.*" This is entirely incorrect. The Supreme Court of Ohio never determined the maximum rates and

charges that Appellee should have been authorized to collect, nor did Appellants allege in their petition that the Supreme Court of Ohio had made any such determination.

In their second paragraph under the heading "Questions Presented" on page 3 of their Jurisdictional Statement, Appellants refer to the Ohio statutes which "abrogate all judicial remedies for restitution," thereby at the very least suggesting that restitution is a matter of right. However, as Mr. Justice Cardozo stated in the opinion of the Court in the case of *Atlantic Coast Line R. Co.* v. *State of Florida*, 295 U. S. 301, 309-10, 79 L. Ed. 1451, 1457-8 (1935):

> "A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. *The claimant to prevail must show* that the money was received *in such circumstances* that the possessor will give offense to equity and good conscience if permitted to retain it. The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it. . . .
>
> "Suits for restitution upon the reversal of a judgment have been subjected to the empire of that principle like suits for restitution generally. '*Restitution is not of mere right. It is ex gratia*, resting in the exercise of a sound discretion, and *the court will not order it where the justice of the case does not call for it*, nor where the process is set aside for a mere slip.' . . . 'In such cases the simple but comprehensive question is whether the *circumstances* are such that equitably the defendant should restore to the plaintiff what he has received.' " (Citations of authority omitted.) (Emphasis supplied.)

On page 11 of their Jurisdictional Statement, Appellants state that "due process requires that an appeal to the

courts be afforded from a rate fixing order of an administrative agency" and that "the right to judicial review must be more than a mere formality." The public utility laws of the State of Ohio clearly provide an appeal to the supreme court of the state, and they also provide for a suspension of the rates pending the appeal. Ohio Revised Code, Sections 4903.13 and 4903.16; Appellants' Jurisdictional Statement, Appendix F, pages 37a-38a. The Supreme Court of Ohio has held in this very case that the provision for suspension of the rates was applicable to the present situation. Appellants' Jurisdictional Statement, Appendix A, pages 4a-5a.

After these major inaccuracies in Appellants' statement of their case are corrected, it would appear that the true questions presented are as follows:

(1) Is a cause of action for restitution on the ground of unjust enrichment stated against an Ohio telephone company, where the plaintiff customer fails to allege that the rates, the collection of which is the basis of the claim of unjust enrichment, were excessive, unjust or unreasonable, or were ever held by either the Public Utilities Commission of Ohio or the Supreme Court of Ohio to be excessive, unjust or unreasonable, and where in fact it affirmatively appears from the plaintiff's allegations that the rates in question were at all times collected pursuant to the orders of the Public Utilities Commission of Ohio then in effect?

(2) Is a customer of an Ohio telephone company entitled to bring suit in a Court of Common Pleas for a refund of rates collected by the company pursuant to an order of the Public Utilities Commission of Ohio, on the sole ground that in an appeal to the Supreme Court (in which no bond was posted to stay the execution of the order in accordance with Section 4903.16, Ohio Revised Code [Appellants' Jurisdictional Statement, Appendix F, page 38a]), the order of the commission was reversed and that on remand the commis-

sion issued a new order prescribing lower rates for the future? Particularly, may such a suit be brought notwithstanding the provisions of Section 4903.12, Ohio Revised Code (Appellants' Jurisdictional Statement, Appendix F, page 37a), that no court other than the Supreme Court shall have power to review any order of the Public Utilities Commission, and also notwithstanding the provisions of Section 4905.32, Ohio Revised Code (Appellants' Jurisdictional Statement, Appendix F, page 39a), that no public utility shall directly or indirectly refund any part of a rate collected by it pursuant to an order of the commission?

When the questions are thus placed in their proper perspective, we respectfully submit that it readily appears that they are not substantial federal questions.

(B) APPELLANTS' AUTHORITIES

On page 7 of their Jurisdictional Statement, Appellants contend that the common law remedy of restitution "has always been available for the recovery of sums paid under compulsion of a judgment or administrative order subsequently reversed." In support of this contention they cite two decisions by the Supreme Court of the United States, one decision by the Supreme Court of Ohio, and the Restatement of Restitution.

The decisions of this Court are *Baltimore & Ohio R. Company* v. *United States*, 279 U. S. 781, 73 L. Ed. 954 (1929), and *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U. S. 332, 100 L. Ed. 373 (1956). Both of these cases are readily distinguishable from the present case. The *B & O* Case did not involve an order finding certain rates to be just and reasonable which was subsequently reversed for failure to follow statutory standards and remanded for reconsideration, but rather involved an attempt by the Interstate Commerce Commission, under the guise of its authority to require railroads to adopt just

and reasonable practices, to issue an order which affected the revenues of the railroads involved, without any evidence to show that the effect on revenues was just and reasonable.

Moreover, the *Mobile* Case, like the *B & O* Case, is clearly distinguishable from the present case because it did not involve the reversal of a commission order approving rates as being just and reasonable. The *Mobile* Case involved a unilateral attempt to change private contract rates.

Another point of distinction is that both the *B & O* Case and the *Mobile* Case involved statutes fundamentally different from the Ohio public utilities statutes.

The Ohio case of *Hiler* v. *Hiler*, 35 Ohio St. 645 (1880), deals with the reversal of a judgment rather than of an administrative order. The same is true of Section 74 of the Restatement of Restitution, also relied upon by Appellants, which by its own terms is confined to a statement of principles applicable to judgments subsequently reversed.

In this connection, it is to be noted that in any event one of the fundamental conditions that must be met before a court will order restitution on the ground of unjust enrichment is that it must appear that to do so will involve "no violation or frustration of law or opposition to public policy, either directly or indirectly." 46 American Jurisprudence 99 (Restitution and Unjust Enrichment). Since the law and the public policy of the State of Ohio with regard to telephone rates have been embodied in a comprehensive set of regulatory statutes, those statutes must be examined to determine whether ordering "restitution" in this case —that is, granting the refund which Appellants seek— would result in violation or frustration, either direct or indirect, of the law as laid down by the Legislature. Both the trial court and the Supreme Court of Ohio have clearly found that the granting of restitution would result in violation or frustration of the public utility laws of Ohio.

On page 11 of their Jurisdictional Statement, Appellants contend that in the absence of statutory provision for an administrative refund of rates collected under a rate order that is subsequently reversed, "the courts have uniformly held that 'the law raised an obligation' against the utility to make restitution of excessive rates paid in compliance with the reversed order and have afforded the traditional common law remedy of restitution." In addition to the *B & O* Case and the *Mobile* Case, they cite in support of this contention *Colteryahn Sanitary Dairy* v. *Milk Control Commission*, 322 Pa. 15, 1 Atl. (2d) 775 (1938), and *Natural Gas Pipe Line Company of America* v. *Harrington*, 139 F. Supp. 452 (D. C. N. D. Tex. 1956).

In the *Colteryahn* Case it was stated that certain dealers who had appealed from a commission order "could sue for recoupment" in the event the order was found unreasonable and the commission required to fix a lower price. No claim for recoupment, however, was before the court, and the statement was, therefore, strictly obiter dictum.

The *Harrington* Case is also readily distinguishable since it involved rates collected pursuant to an order of the Oklahoma Commission that the Supreme Court of the United States (reversing the Supreme Court of Oklahoma which had affirmed the order) had held to be invalid because the rates in question "cannot be regulated by a State but are subject to the exclusive regulation of the Federal Power Commission." 139 F. Supp. at page 457. In other words, the case did not involve an order reversed and remanded because the commission had erred in the application of statutory standards, but rather involved an order held invalid because the commission had entirely exceeded its authority in issuing any order at all.

No cases have been found or cited that hold contrary to the decision of the Supreme Court of Ohio in this case or the decision of the Supreme Court of Illinois in the case of

Mandel Bros. v. *Chicago Tunnel Terminal Company*, 2 Ill. (2d) 205, 117 N. E. (2d) 774 (1954). Other cases to the same effect are *Purcell* v. *New York Central R. Company*, 242 App. Div. 292, 275 N. Y. S. 70 (1934), affirmed, 268 N. Y. 164, 197 N. E. 182 (1935), appeal dismissed and writ of certiorari denied, 296 U. S. 545, 80 L. Ed. 387 (1935); *Gurney Heater Manufacturing Company* v. *New York, New Haven and Hartford R. Company*, 264 Mass. 427, 162 N. E. 897 (1928); and *Texas & Pacific R. Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426, 51 L. Ed. 553 (1907).

Conclusion

For the reasons set forth in this motion, we respectfully pray that the appeal be dismissed both because the federal question was not timely raised and because the federal question is not substantial.

Respectfully submitted,

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Appendix

Section 2309.60, Ohio Revised Code:

> Amendment after demurrer sustained. If a demurrer is sustained, the adverse party may amend if the defect thus can be remedied, with or without costs as the court directs. It is no objection to such amendment that it changes the action from law to equity, or vice versa, if its basis, essential facts, and final object remain the same.